Supreme Court, U.S.
FILED
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No. ____

IN THE

Supreme Court of the United States

NEW YORK,

Petitioner,

vs.

WILLIAM P. HAVRISH,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Through an order of protection, Havrish was ordered to surrender all firearms owned or in his possession. Havrish then turned in an illegal handgun. The Fifth Amendment guarantees that individuals cannot be compelled to be a witness against themselves. But this principle only extends to matters of a testimonial or communicative nature – not non-testimonial tangible physical evidence which is incriminating. Since Havrish was not compelled to produce anything testimonial or communicative, did the New York Court of Appeals incorrectly determine that a violation of the Fifth Amendment occurred?

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The opinion of the New York State Court of Appeals – the highest state court to review the merits of this case – appears in the Appendix to the petition, at 1a, and is unpublished. The Decision and Order of the Schoharie County Court appears in the Appendix at 11a.

JURISDICTION

The date when the Court of Appeals decided this case was April 3, 2007. This petition for certiorari is filed within ninety days of that decision, and is therefore timely. Sup. Ct. R. 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; ***nor shall be compelled in any criminal case to be a witness against himself***, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public

use, without just compensation *(emphasis supplied)*.

STATEMENT OF THE CASE

Facts

On April 8, 2005, the appellant, William Havrish, was arrested and issued an Order of Protection out of the Delhi Town Court (Delaware County, New York) for charges that included Burglary and Kidnapping. Under the terms of that Order of Protection, Havrish was ordered to "Surrender any and all firearms owned or possessed. . .."

Subsequently, Havrish posted bail the same morning and then allowed deputies to come to his home in Jefferson, (Schoharie County) New York to surrender his long guns. Havrish also told deputies that he had given a pistol to his former wife, Linda Havrish who was not the subject of the Town Court's Order of Protection. Based on that information, Deputy Joseph A. Andreno interviewed Linda Havrish later that day. Linda explained that she did not have the pistol and added that her husband did not have a license for it.

Eventually, Deputy Andreno received a telephone message that William Havrish had called, and claimed that he had found the pistol. Deputy Andreno then responded to Havrish's residence in Jefferson and secured the pistol – a Ruger .44 Magnum Blackhawk revolver. While Andreno was writing out a receipt for the handgun, Havrish inquired whether or not he would need a permit to get the pistol back. Andreno did not reply.

Ultimately, Havrish was charged in the Jefferson Town Court with Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law §265.01[1] – a class A misdemeanor) for possessing the handgun without a valid license. After arraignment, Havrish moved to dismiss the case claiming that his Fifth Amendment right against self-incrimination had been violated because he was forced to turn over the illegal handgun and that his Fourth Amendment rights had been violated.

Procedural History

On January 25, 2006, the Jefferson Town Court (Hait, J.) granted the defendant's motion to dismiss on these grounds and also suppressed the evidence consisting of the handgun and statements made to police.

The People took an appeal to the Schoharie County Court (Bartlett, J.). By decision and order dated June 8, 2006, County Court reversed Town Court's order finding that no Fourth or Fifth Amendment violation occurred and reinstated the accusatory instrument (11a).

Havrish was granted leave to appeal to the New York State Court of Appeals on September 14, 2006. On February 8, 2007, the New York State Court of Appeals heard cral argument on the issue of whether Havrish's surrender of the handgun was privileged under the Fifth Amendment. By Decision and Order dated April 3, 2007, it found that it was privileged and, accordingly, reversed County Court's order and granted Havrish's motion to suppress and dismiss the accusatory instrument (1a).

REASONS FOR GRANTING THE WRIT

This case presents a single compelling issue for this Court's consideration – one that goes to the heart of the Fifth Amendment. Indeed, this case represents an opportunity for this Court to review a case when physical evidence – which is not documentary in nature – has been held to rise to the level of being testimonial or communicative, thus triggering Fifth Amendment Protection based on the act of production doctrine.

This Court has held as constitutional, a defendant's compelled production of the following physical evidence even though that evidence led to prosecution and conviction: to give a blood sample (*Schmerber v. California*, 384 U.S. 757, 765 (1966)); to stand in a lineup (*United States v. Wade*, 388 U.S. 218, 221(1967)); to wear particular clothing (*Holt v. United States*, 218 U.S. 245, 252 (1910)); and to provide a handwriting exemplar, (*Gilbert v. California* 388 U.S. 266, 266 (1951)). In the case below, the Court of Appeals relied upon to the act of production doctrine when it determined that Havrish's surrender of the handgun was "sufficiently incriminating to give rise to Fifth Amendment protection." In *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), this Court held that when the government demands the production of an item, " the only thing compelled is the act of producing the item." Id. at 554-555.

Historically, the act of production doctrine has only been applied to the surrender of subpoenaed documents. But in *Bouknight*, this Court suggested that it can also apply to the compelled production of other types of evidence. Even more recently in *United States v. Patane*, 542 U.S. 630, 644 n7 (2004), this Court touched on the scope of the self-incrimination clause and proposed that it ***was*** possible to use

legal process to compel a defendant to produce physical evidence [a handgun].

The facts of this case are well-suited to serve as a vehicle for this Court to clarify not only the scope of the self incrimination clause, but also the act of production doctrine.

CONCLUSION

This Court should grant certiorari to determine whether the act of surrendering a handgun has certain testimonial or communicative aspects that is privileged under the Fifth Amendment.

Respectfully submitted,

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July 2, 2007

APPENDIX

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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF
NEW YORK,

Respondent,

-against-

WILLIAM P. HAVRISH,

Appellant.

Argued February 8, 2007 Decided April 3, 2007

COUNSEL: Patrick J.Cannon, for appellant.

Thomas F. Garner, for respondent.

JUDGES: Opinion by Judge V.A.Graffeo, Chief Judge Kaye, and Judges Ciparick, Read, R.S.Smith, and Pigott. Judge T.Jones took no part.

GRAFFEO, J.:

In complying with an order of protection that directed him to turn over his firearms to police, defendant produced an unlicensed handgun and was subsequently charged with criminal possession of a weapon in the fourth degree. The issue before us is whether defendant's surrender of the handgun was privileged under the Fifth Amendment. We conclude that is was and therefore reverse the order of County Court, grant

defendant's motion to suppress and dismiss the accusatory instrument.

On April 8, 2005, defendant was charged with Delhi Town Court with assault in the third degree, burglary in the second degree, and kidnapping in the second degree in connection with a domestic violence incident in Delaware County. The Town Court set bail and issued an order of protection directing defendant to stay away from the victim and to "surrender any and all firearms owned and possessed."

After defendant posted bail, the police accompanied him to his residence in Schoharie County where defendant promptly gave the officers his "long guns." Defendant advised the authorities that he owned and handgun but had given it to his ex-wife. The police contacted defendant's ex-wife, who informed them that she did not possess the pistol, but believed defendant still had it. She claimed to have last seen the gun in a small room off the living room in defendant's home. With some equivocation, she also indicated that the handgun was not licensed.

Before the authorities acted on the information supplied by defendant's ex-wife, defendant called one of the officers and said that he had located the pistol. When the police arrived at his home, defendant brought them to a small room next to the living room, where they retrieved a Ruger Blackhawk .44 magnum revolved from a milk crate.

Once the police confirmed that defendant did not have a license for the handgun, defendant was charged in Jefferson Town Court with criminal possession of a weapon in the fourth degree, a class A misdemeanor. He moved to dismiss the accusatory instrument on the ground that the gun and his statements to police must be suppressed because he was

compelled to produce evidence protected by the Fifth Amendment right against self-incrimination. Defense counsel argued that the order directing defendant to turn over his weapons created an impossible dilemma, since defendant was required either to produce the unlicensed pistol, thereby incriminating himself, or defy the court order and risk being prosecuted for criminal contempt. Among other arguments, the People countered that defendant's Fifth Amendment rights were not implicated because surrender of the revolver involved production of physical evidence that was not communicative or testimonial in nature.[1]

Jefferson Town Court granted defendant's motion to suppress, concluding that for purposes of the weapon possession prosecution, defendant's surrender of the pistol was privileged under the Fifth Amendment. Because the People did not assert that they possessed independent evidence of defendant's guilt, the court determined that dismissal of the accusatory instrument was also warranted. On the People's appeal, County Court reversed and reinstated the charge, reasoning that the order directing defendant to surrender the handgun involved the production of real or physical evidence, not compelled communication, and therefore did not run afoul of the Fifth Amendment. A Judge of this Court granted defendant leave to appeal and we now reverse.

The Fifth Amendment guarantees that an individual shall "not be compelled in any criminal case to be a witness against himself" (U.S. Const. 5th Amend). "[T]he privilege protects an accused . . . from being compelled to testify against

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[1]The People also contended that defendant could not seek suppression based on the Fifth Amendment because he did not invoke the privilege before he turned over the weapon. See, e.g. Roberts v. United States, 445 U.S. 552, 559-561 [1980]). The People having failed to brief this argument on appeal, we have no occasion to consider it.

himself, or otherwise provide the State with evidence of a testimonial or communicative nature" (Schmerber v. California, 384 U.S. 757, 761 [1966]). There are thus two elements to the privilege: the presence of compulsion and the solicitation or receipt by the government of evidence of a testimonial nature.

Here, the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons. Had he failed to do so, he could have been prosecuted for criminal contempt. The more difficult question is whether compliance with the order supplied testimonial or communicative evidence or whether, as County Court concluded, defendant was merely directed to supply "real or physical evidence" not protected by the Fifth Amendment.

It is well settled that a person can be forced to produce real or physical evidence without offending the privilege against self-incrimination (id.). Cases in which a defendant is required to engage in conduct that reveals the physical characteristics of his or her body generally fall in the "real or physical evidence" category. For example, in Schmerber, the Court held that the requirement that a defendant accused of driving while intoxicated submit to a blood test did not implicate the Fifth Amendment privilege because defendant's "testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis, and on that alone" (id. at 765).

The Fifth Amendment therefore "offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume the stance, to walk, or to make a particular gesture" (id. at 764). Similarly, a defendant can be ordered to participate in a lineup (see United States v. Wade, 388 U.S. 218 [1967]) or to provide a handwritten exemplar (see

Gilbert v. California, 388 U.S. 263 [1967]) without implicating the privilege against self-incrimination. Our Court has applied the Schmerber on a number of occasions, holding that field sobriety tests conducted during a traffic stop were the equivalent of real or physical evidence not protected under the Fifth Amendment (People v. Hager, 69 N.Y.2d 141 [1987]; see People v. Bert, 92 N.Y.2d 701 [1999]) and that a defendant could not rely on the privilege to avoid compliance with a court order requiring him to display his upper body tattoos (see People v. Slavin, 1 N.Y.3d 392, cert. denied 543 U.S. 818 [2004]).

The People rely on the Schmerber analysis in asserting that defendant's surrender of the revolver was not conduct protected by the Fifth Amendment. But the surrender of evidence – even evidence not otherwise cloaked by privilege – may itself be privileged if the very act of production has communicative or testimonial aspects (see United States v. Doe, 465 U.S. 605, 613 [1984]["Doe I"]). Although the act of production has most commonly been applied to the surrender of subpoenaed documents, the U.S. Supreme Court has indicated that it can also apply to the compelled production of other types of evidence (see Baltimore City Dept. of Social Servs. v. Bouknight, 493 U.S. 549 [1990]; but see United States v. Patane, 542 U.S. 630, 644 n7 [2004]). And the Court has emphasized that the item produced is distinct from the act of production itself. In sum, even when the thing demanded is not privileged, the act of production may be (see Doe I, 465 U.S. 613).[2]

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[2] For example, in the case of a document, the contents are not deemed to have been compelled if the document was prepared voluntarily. Even if the contents of the document are not cloaked with the privilege because the element of compulsion is absent, the doctrine may apply to privilege the act of producing the document (Doe I, 465 U.S. at 617 n17; see Fisher v. United States, 425 U.S. 391, 409-410 [1976]). Similarly, in Bouknight, where the

In Bouknight, the judge presiding over a child-protective proceeding ordered a mother to produce her child in court. She refused, invoking the Fifth Amendment. In considering whether the mother could rely on the act of production doctrine to avoid compliance with the court order, the Court explained the doctrine as follows:

> "When the government demands that an item be produced, the only thing compelled is the act of producing the item . . . The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession or authenticity of the things produced" (493 U.S. at 554-555 [internal quotations, citations and brackets omitted]; see United States v. Hubbell, 530 U.S. 27, 36[2000]).

Ultimately, the Court held the doctrine inapplicable to the mother's circumstance, because it could not be used to resist compliance with a civil regulatory regime constructed to effectuate governmental purposes unrelated to law enforcement

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Supreme Court considered whether a mother could invoke the privilege in order to avoid producing her child for a court proceeding, the Court noted that, if the doctrine applied, the baby itself was not privileged and the mother could not "claim the privilege based upon anything that examination of [the child] might reveal" (493 U.S. at 555). Instead, the privilege would apply to the mother's conduct. Thus, the fact that the item to be produced is "real or physical evidence" not protected under the privilege does not automatically preclude application of the act of production doctrine.

– the social services system designed for the protection of children.

In this case, the People did not assert below, and do not argue here, that the Bouknight regulatory regime applies to this factual scenario.[3] Thus, the pivotal issue here is whether defendant's act of producing the unlicensed handgun was privileged. The Supreme Court has developed a two-part test for resolving this question (see Fisher v. United States, 425 U.S. 391 [1976]).

First, a court must assess whether the compelled act of production is sufficiently testimonial. Under the Fifth Amendment, evidence is deemed testimonial when it reveals defendant's subjective knowledge or thought process – when it expresses the contents of defendant's mind (Doe v. United States, 487 U.S. 201, 211 [1988]["Doe II"]; Hager, 69 N.Y.2d at 142). The surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant's possession or control when these facts are unknown to the authorities and would not have been discovered through independent means. But another way, the inquiry is whether the existence of the item sought, or defendant's possession of it, was a "foregone conclusion and the [defendant] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the

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[3] Any argument concerning the applicability of the regulatory regime exception is both unpreserved and waived. Moreover, even if the exception applied, it is not clear to what extent it would assist the People. In Bouknight, the Supreme Court did not define the limitations on the use of testimonial evidence obtained by virtue of the regulatory regime exception but noted in dicta that "the Fifth Amendment protections are not . . . necessarily unavailable to the person who complies with the regulatory requirement after invoking the privilege and subsequently faces prosecution" (493 U.S. at 561, 562).

item" (Fisher, 425 U.S. at 411). In that circumstance, the act of production is not sufficiently testimonial to implicate the Fifth Amendment.

Second, a court must determine whether the act of production is incriminating. If the subjective information the Government will obtain through the act of production does not "pose [ ] any realistic threat of incrimination" (id. at 412) but presents "merely trifling or imaginary hazards of incrimination" (Doe I, 465 U.S. at 614 n13 [internal citations and quotations omitted]), the act enjoys no Fifth Amendment protection. Both elements must be fulfilled for an act of production to be privileged and the Supreme Court has made clear that the elements "do not lend themselves to categorical answers: their resolution . . . instead depend[s] on the facts and circumstances of particular cases" (Fisher, 425 U.S. at 410).

Turning to the first inquiry, in this case, we cannot say, absent defendant's court-ordered surrender of the revolver, the discovery that defendant possessed an unlicensed handgun would have been a "foregone conclusion." Before defendant revealed that he had possessed a revolver, neither the court nor the police were aware that defendant owned a handgun. Further more, defendant's statements about the gun were integral to compliance with the directive in the order of protection. Although it is conceivable that defendant could have heeded the order without uttering a word about his weapons, it was reasonably likely that defendant's response would include verbal communications concerning their existence and location. The statements defendant made – advising police that he owned a revolver and indicating where it was - went no further than what a person complying with such an order would have been expected to communicate. They were therefore central to and part of the act of production. And that act was the

exclusive source of evidence the People relied on in pursuing the prosecution for criminal possession of a weapon.

The People have not come forward with evidence, suggesting that, incident to the charges in the domestic violence case, they were independently investigating whether defendant owned a handgun. It is true that defendant's ex-wife disclosed information to the authorities concerning the unlicensed revolved, but there is no basis in the record to conclude that the police would have contacted her if defendant had not earlier indicated that she had the gun.[4] Nor have the People proffered evidence that the victim of the domestic violence incident knew of the pistol or that, in the ordinary course of investigation of that incident, she would have necessarily alerted them to defendant's unlawful possession of it. Had this information been provided, the police may well have been able to obtain the weapon through execution of a search warrant. But, on this record, defendant's surrender of the gun was testimonial because it revealed defendant's subjective thought processes – that he knowingly possessed the weapon – and, absent this revelation, the information would not have come to the attention of the police.

Defendant's surrender of the handgun was also sufficiently incriminating to give rise to Fifth Amendment protection. The order compelling defendant to turn over his weapons was issued in the course of a felony prosecution without a grant of immunity or amnesty. Indeed, by the time defendant produced the weapon, he had provided the police with proof of virtually every element of the offense of criminal possession of a weapon. Given that the act of production

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[4] There was no connection between the ex-wife and the domestic violence incident in Delaware County, which involved a different person. It appears that the authorities would have had no reason to interview defendant's ex-wife concerning their investigation of the Delaware County charges.

involved the commission of a crime in the presence of police, it can hardly be argued that the conduct was unlikely to result in criminal prosecution.

Both elements of the act of production having been met, defendant's surrender of the unlicensed handgun was privileged under the Fifth Amendment and suppression of the evidence was therefore warranted in the weapons possession prosecution. Because the People have proffered no evidence that law enforcement authorities would have learned of defendant's possession of the revolved through independent means, or that they could have connected defendant to the handgun with proof unrelated to the act of production, the suppression of this evidence necessitated dismissal of the accusatory instrument.

Accordingly, the order of County Court should be reversed, defendant's motion to suppress granted, and the information dismissed.

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF SCHOHARIE

THE PEOPLE OF THE STATE OF
NEW YORK,

-against-

WILLIAM P. HAVRISH,

Defendant.

Decided and Entered June 8, 2006

COUNSEL: James Sackett, Schoharie County District Attorney (Thomas F. Garner, Assistant District Attorney of counsel), for the People

Patrick J. Cannon, for defendant.

JUDGE: George R. Bartlett, III, J.C.C.

Background

The People appeal from the Decision and Order of the Town of Jefferson Justice Court (the Hon. Lynn Hait, J.), dated January 25, 2006 and entered February 8, 2006, dismissing the accusatory instrument charging defendant with the crime of Criminal Possession of Weapon in the Fourth Degree, a Class A misdemeanor, in violation of Penal Law §265.01[1] and suppressing certain evidence, more particularly, "the weapon

[defendant] was alleged to have possessed and statements made to the police in connection with his possession of that weapon."

The People contend that the trial court erred in suppressing the evidence and dismissing the accusatory instruments on the grounds of the violation of defendant's Fourth Amendment protections against unlawful searches and seizures and Fifth Amendment protections against governmentally compelled self-incrimination.

Discussion

The facts surrounding this matter are not in dispute. The record provided to this Court by appellate counsel provided the opportunity for meaningful appellate review. On or about April 8, 2005, defendant surrendered his weapons, including his unlicensed handgun, to the Delaware County Sheriff pursuant to a lawful court order; he was not subjected to any search or seizure of constitutional dimension. Moreover, since both defendant and his wife both independently and voluntarily advised the police of the handguns' existence and its location, the police would have inevitably discovered it anyway.

Turning to the People's contention that Town Court incorrectly found a violation of defendant's right against self-incrimination, contrary to Judge Hait's determination, to the extent, if any, that defendant was compelled to turn over his handgun, it is now well settled that "a person can be forced to produce real or physical evidence without his or her Fifth amendment rights (see, People v. Berg, 92 N.Y.2d 701, 704, quoting Schmerber v. California, 384 U.S. at 764; see also, People v. Slavin, 1 N.Y.3d 392, cert. denied, 543 U.S. 818).

As the United States Supreme Court explained, "there is a significant difference between the use of compulsion to extort

communication from a defendant in compelling a person to engage in conduct that may be incriminating" (see, U. S. v. Hubbell, 530 U.S. 27 at 34-35). In the latter situation, the privilege is not violated because "the prohibition of compelling a man to be witness against himself is a prohibition of the use of . . . compulsion to extort communications from him, not in exclusion of evidence when it may be material "(id. at 35 n9, quoting Holt v. United States, 218 U.S. 245, 252-253). "The privilege does not excuse compliance with a governmental demand for the production of something, and 'a person may not claim the Fifth Amendment's protections based upon incrimination that may result from the nature of the thing demanded'" (see, Prince Richardson on Evidence [11th Edition, Farrell] §5-702, quoting Baltimore City Department of Social Services v. Bouknight, 493 U.S. 549, 555).

Accordingly, it is **ORDERED AND ADJUDGED**, that the decision of the Town of Jefferson Justice Court, dated January 25, 2006, and entered February 8, 2006, dismissing the accusatory instrument and suppressing the introduction at trial of certain physical evidence and defendant's statements made with respect thereto be and hereby is reversed and the order vacated; and the accusatory instrument reinstated; and it is **FURTHER ORDERED AND ADJUDGED**, that this matter is remitted to the Town of Jefferson Justice Court for further proceedings consistent with the foregoing decision and order.

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(2)

No. 07-16

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SUPREME COURT, U.S.

IN THE

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NEW YORK,

Petitioner,

v.

WILLIAM P. HAVRISH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a person is compelled, under pain of prosecution for criminal contempt of court,[1] by an order of protection issued by a local criminal court, to produce "any and all firearms,"[2] and to surrender those firearms to the police, and, in obedience to that specific order, a person surrenders an unlicensed revolver to the police, which neither the police nor the court had any knowledge of, may the revolver, which had never been involved in any other crime or offense, and which was not involved in the criminal proceeding in which the order of protection was issued, be used against him as evidence on the trial of a new criminal prosecution for unlawful possession of a weapon, a class "A" misdemeanor in violation of New York Penal Law § 265.01, based on the person's possession of the revolver surrendered to the police in compliance with the order of protection?

2. Under the same circumstances, may the government use statements made by the possessor of the revolver to the police while he was in the process of surrendering the revolver to them, pursuant to the order of protection, when the statements were made after he had been arraigned in said local criminal court on unrelated criminal charges, and his right to counsel had attached in an unrelated criminal action, and where he was not given any of the warnings required by *Miranda* prior to his statements, as evidence against him at his trial for criminal possession of a weapon?

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1. See New York Judiciary Law, Article 19, and New York Penal Law § 215.50 (3).

2. "Firearm" is defined under New York law as, *inter alia*, ". . . any pistol or revolver." (New York Penal Law § 265.00 [3][a].)

3. Respondent's arguments concerning the same circumstances under the Fourth and Fourteenth Amendments to the United States Constitution, and under Article I, sections 6 and 12 of the Constitution of the State of New York were not addressed by the New York Court of Appeals and are not addressed in the petition for certiorari. They are not, apparently, before this Court.

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New York Penal Law § 265.00 [3][a] ..... i, 2

New York Penal Law, Title P, Article 265, § 265.01 ..... i, 2, 6, 17

OPINIONS BELOW

The opinion of the New York State Court of Appeals appears in the appendix to the petition filed in this court at p. 1a. The opinion is published at 8 NY3d 389, 866 N.E.2d 1009, and 834 N.Y.S.2d 681(2007). The opinion, as reproduced in the petitioner's appendix, contains several typographical errors which do not, on the whole, significantly detract from or adversely affect the sense or meaning of the opinion.

The opinion of the Intermediate Appellate Court, which was reversed by the Court of Appeals, appears in the appendix to the petition at page 11a. It is unpublished.

The opinion of the Local Criminal Court is contained in the order dated February 8, 2006 which granted respondent's motion to suppress the revolver he was accused of possessing. It dismissed the accusatory instrument filed against him. The order was not included in the petitioner's appendix. It is unpublished. It appears in the respondent's appendix attached hereto at page RA 3. This order was a part of the record on appeal in the New York Court of Appeals.

Further explanation of the decision upon which the Local Criminal Court based its order dated February 8, 2006 is found in his "Return on Appeal" dated March 24, 2006 and filed in Intermediate Appellate Court in connection with the petitioner's appeal from that order. This Return was not included in the petitioner's appendix. It is unpublished. It appears in the respondent's appendix attached hereto at page RA 7. This Return was a part of the record on appeal in the New York Court of Appeals.

COUNTERSTATEMENT OF THE CASE

1. Under "Questions Presented for Review" petitioner refers to an "illegal handgun." The handgun which respondent was accused of possessing was a Ruger© single action revolver. It was not a submachine gun or machine pistol such as might be employed by terrorists or revolutionaries, or a "sawed off" shotgun such as might be employed by gangsters. That type of weapon would certainly be illegal *per se*. The revolver which respondent was accused of possessing was primarily intended for recreational target shooting and/or hunting. Petitioner is apparently trying to put some "spin" on the facts to make respondent look like an inherently evil person because of the type of gun which he was accused of possessing. There is nothing in the record to support such a characterization.

Having said that, however, it must also be noted that, under New York Law, mere *possession* of any handgun is, in fact, unlawful *per se*. New York Penal Law, Title P, Article 265, § 265.01 provides that: "A person is guilty of criminal possession of a weapon in the fourth degree when: (1) He possesses any *firearm* . . . . (Emphasis added.).[3] The statute defining the offense makes no distinction between licensed and unlicensed, or between registered and unregistered, firearms.[4] Thus, simply by the act of obeying the order of protection and delivering the pistol to the police, the respondent was compelled to involuntarily provide testimonial evidence incriminating himself.

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3. Note again that "*Firearm*" is defined as, *inter alia*, ". . . any pistol or revolver." (NYPL § 265.00 [3][a].)

4. New York Penal Law, Title W, Article 400, §§ 400.00 – 400.10, deals with licenses which will render otherwise illegal possession legal for those who hold such licenses under certain circumstances.

2. Petitioner, under the "Facts" portion of the "Statement of the Case" section of the petition, alleges that respondent had been arrested and charged with Burglary and Kidnaping. While that is literally true, petitioner is aware and yet has failed to mention that both of those charges had been dismissed before this case was argued in the New York Court of Appeals.

3. Petitioner, under the same section of the petition, claims that respondent's ex-wife told the police that respondent did not have a license for the handgun he was accused of possessing. While this may also be literally true, examination of the record will explain why the New York Court of Appeals referred to this statement as equivocal. (See petitioner's appendix page 2a.) It is equally true that the police would have had no reason to contact respondent's ex-wife but for the involuntary admissions he was compelled to make to them. (*Id.* at 9a)

4. Petitioner, under the same section of the petition, claims that respondent made an inculpatory statement to Deputy Joseph Andreno, while Deputy Andreno was writing out a receipt for the handgun being seized. The propriety, or lack thereof, of the continued interaction between the police and the respondent, after the respondent's right to counsel had attached, and without any of the warnings required by this court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), was raised by the respondent in all of the courts below, but none of them apparently found it necessary to specifically address the issue in their determinations.

5. Petitioner, under the same section of the petition, recites that respondent moved in the Local Criminal Court, after his arraignment, ". . . to dismiss the case claiming that his fifth Amendment right against self-incrimination had been violated because he was forced to turn over the illegal handgun and that his Fourth Amendment rights had been violated."

(Petition, p. 3) The petition also states, in the portion of the section under "Statement of the Case" denominated "Procedural History," that: On January 25, 2006, the Jefferson Town Court (HAIT, J.)[5] granted the defendant's motion to dismiss on all these grounds and also suppressed the evidence consisting of the handgun and statements made to police." (Petition, p. 3)

Petitioner erred in describing the substantive and procedural issues involved. Respondent did not move to dismiss the "case" against him because his rights had been violated. He moved to suppress the handgun and the statements he made to the police pursuant to section 710.20 of the New York Criminal Procedure Law upon the grounds that such evidence had been obtained: (1) in violation of his rights under the Fourth Amendment to the United States Constitution and Article I, section 12 of the New York State Constitution, and (2) in violation of his rights under the Fifth Amendment to the United States Constitution and Article I, section 6 of the New York State Constitution. He also argued that he had been denied due process of law as required by the Fourteenth Amendment to the United States Constitution, and that, if the evidence which he challenged were suppressed, then the accusatory instrument should be dismissed because the government could produce no other evidence of his guilt.

In his order suppressing the revolver and the respondent's statements concerning it, the Local Criminal Court accepted all of these arguments. He (JUDGE HAIT) ruled that the manner in which the police obtained evidence of the respondent's guilt was in violation of his right to due process of law, and that the respondent was required to provide self-incriminatory evidence against himself in violation of his rights under the Fifth Amendment to the United States Constitution and under Article

5. Elsewhere referred to a the Local Criminal Court.

I, section 6 of the Constitution of the State of New York, and that the evidence seized from the respondent, *i.e.* the weapon which he was accused of possessing, must be suppressed, along with the statements allegedly made to the police by the respondent in connection with that weapon,

He also ruled that the weapon which the respondent was accused of possessing must be suppressed under the Fourth Amendment to the United States Constitution and under Article 1, section 6 of the New York State Constitution, and that, since the people had made no offer of proof with respect to any other evidence of the respondent's guilt, the accusatory instrument filed against him must be dismissed because, after the evidence which had been unconstitutionally obtained was properly suppressed, the prosecution could not proceed since there was no evidence of the respondent's guilt which the people could produce at trial which would result in the presentment of a *prima facie* case sufficient to go to a jury. (RA 4)

6. Petitioner, under the same section of the petition, recites that respondent was granted leave to appeal to the New York Court of Appeals which, ". . . heard oral argument on the issue of whether Havrish's surrender of the handgun was privileged under the Fifth Amendment." (Petition p. 3) Respondent did not limit his argument in the New York Court of Appeals to Fifth Amendment issues. The "Questions Presented" section of respondent's brief to that court stated that issues were presented under both the New York State and the Federal Constitutions (RA 11).

The respondent has never, therefore, waived or abandoned his claims under the Fourth and Fourteenth Amendments to the United States Constitution, or under Article I, sections 6 and 12 of the New York State Constitution, even though the New York Court of Appeals chose to base its decision only on the Fifth Amendment to the United States Constitution.

REASONS FOR DENYING THE PETITION

Procedural History:

The respondent was the subject of an order of protection, in an entirely unrelated case, issued by the a Town Court (HON. JOSEPH SKOVIRA) in Delaware County which required him to surrender all of his weapons and firearms to the police. One of the firearms which he surrendered was a revolver for which he had no license.[6] Upon surrendering this handgun, respondent was arrested for Criminal Possession of a Weapon in the Fourth Degree (New York Penal Law § 265.01 [1]).

He moved to suppress the handgun and all statements made by him to the police in connection with it on the grounds that this rights to due process, to remain silent, and to be free from unreasonable searches and seizures were violated under both the United States Constitution and the Constitution of the State of New York. The Local Criminal Court granted his motion, suppressed the revolver and all of respondent's statements concerning it, and dismissed the accusatory instrument. The people appealed, and the Intermediate Appellate Court reversed the Local Criminal Court, reinstated the accusatory instrument, and remanded the matter to the Local Criminal Court for further proceedings. Defendant appealed to the New York State Court of Appeals from that Order. The New York Court of Appeals reversed the order of the Intermediate Appellate Court, suppressed the revolver and all of respondent's statements concerning it, and dismissed the accusatory instrument for lack

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6. This unlicensed firearm was not alleged to have been used in or in any way related to the charges in Delhi at all. The Order of Protection is relevant only because it compelled the respondent to surrender "all" of his firearms, and that direction included the revolver which formed the basis for the charge of unlawful possession which is the subject of this petition.

of evidence. The people of the State of New York now seek a writ of certiorari from this Court to the New York State Court of Appeals to determine whether the respondent's act of surrendering the revolver to the police under the compulsion of a court order requiring him to do so was testimonial, and therefore in violation of his rights under the Fifth Amendment to the United States Constitution under the "act of delivery" doctrine. Respondent's arguments under the Fourth and Fourteenth Amendments to the United States Constitution, and under Article I, sections 6 and 12, of the New York State Constitution, which were accepted by the Local Criminal Court, were not addressed by the New York State Court of Appeals.

***Statement of Facts*:**

On or about August 7, 2006, respondent was arrested in connection with unrelated charges in Delaware County, all of which have since been dismissed.[7] Upon his arraignment, an order of protection was issued which required, *inter alia*, that he surrender all firearms which he "owned or possessed" to the police. After his release on bail, he permitted deputies from the Delaware County Sheriff's department to accompany him to his home in Schoharie County, where he turned over all of his long guns (rifles and shotguns) to them in obedience to the order.

When the Delaware County Deputies accompanied respondent to his Schoharie County home, respondent told them that he had given a pistol to his former wife, a woman named Linda Havrish, and that he didn't know exactly where it was then located. Since, technically, respondent still "owned" that handgun, he was required by the order of protection to tell the police about it and assist them in taking possession of it.

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7. This entire case developed from a boyfriend/girlfriend relationship which ended badly. The respondent plead guilty to a single count of Criminal Trespass in full satisfaction of all charges.

The following morning a Delaware County Deputy contacted respondent's ex-wife. She described the pistol, said she did not have it, and first told the deputy that respondent had a pistol license, then said that he did not. A short time later, this Deputy says, his dispatcher contacted him and advised him that respondent had called to say that he had found the pistol. The Deputy called respondent and respondent told him that he could come to his residence to pick it up.

The Deputy said that, when he arrived at respondent's residence, he was shown to a small room "off the living room" where he "found" the pistol in a milk crate next to a cabinet, and that, while he was writing out a receipt for the pistol, respondent asked him whether he would need a permit to get the pistol back. The Deputy did not reply, but then contacted the Schoharie County Sheriff's Department and gave them the above information which was used as the basis for the present charge.

***Argument*:**

I

The best and most compelling reason for denying the Writ sought by the petitioner is that the New York State Court of Appeals correctly decided this case. This Court is, therefore, respectfully referred to JUDGE GRAFFEO's decision, which appears at pages 1a through 10a of the petitioner's appendix.

II

The only authority cited by the petitioner which was not discussed by the Courts below is *United States v. Patane*, 542 U.S. 630 (2007). The New York State Court of Appeals recognized this case in its opinion (5a).

In the *Patane* case, the police located and found the defendant's pistol because of his voluntary statements. In this case the police located and seized the respondent's revolver because of his involuntary and compelled statements.

MR. JUSTICE THOMAS, in the opening paragraph of the majority opinion in *Patane*, mentions the primary distinction, to wit:

> "In this case we must decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), requires suppression of the physical fruits of the suspect's unwarned but *voluntary* statements. . . . . Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from *voluntary* statements, we answer the question presented in the negative."

(*Id.* at 542 U.S. 630, 633- 634; *Emphasis added.*)

Other parts of the *Patane*, supra, opinion reflect the same focus, *e.g.*, "The Self-Incrimination Clause . . . is not implicated by the admission into evidence of the physical fruit of a *voluntary* statement." (*Id.* at 542 U.S. 630, 637);" "The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of *voluntary* statements." (*Id.* at 542 U.S. 630, 637); We have repeatedly explained that 'those subjected to coercive . . . interrogatories have an *automatic* protection from the use of their *involuntary* statements (or evidence derived form their statements) in any subsequent criminal trial." (*Id.* at 542 U.S. 630, 640); ". . . the Court requires the exclusion of the physical fruit of actually *coerced* statements . . . ." (*Id.* at 542 U.S. 630, 644; *Emphasis added in all quotes*).

Here there is no question that the respondents statements to the police in this case were not voluntary. The New York Court of Appeals specifically held that ". . . the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons, Had he failed to do so, he could have been prosecuted for criminal contempt." (4a) Obviously, the respondent was coerced into making statements to the police concerning the revolver, and as a result of those statements the police were led to and able to seize it.

Patane should be distinguished from this case on other grounds as well. The police in *Patane* already knew that the defendant had a pistol when they went to his home. The police in this case had no idea that the revolver even existed until the respondent was compelled to tell them about it.

The police in *Patane* went to the defendant's home to arrest him for violating an order of protection. The police in this case went to the respondent's home to seize his firearms pursuant to an order of protection, but then went back to seize the revolver only because respondent was compelled to tell them he had found it.

The statements taken from the defendant in *Patane* were taken after the police had attempted to give the defendant his *Miranda* warnings and he had refused to listen to them. In this case there was no attempt made to warn the respondent that he had the right to remain silent and the right to refrain from making any statements to the police about the unlicensed revolver.

III

The only evidence in the record concerning how the police learned about respondent's revolver came from Delaware County Deputy Sheriff Joseph Andreno's supporting deposition provided to the Schoharie County Sheriff's Department.

Accepting his account as completely accurate for the purposes of this petition, there are several remarkable aspects to it. First, he says that he was investigating respondent's possible possession of a hand gun: ". . . in reference to an ongoing investigation where Havrish ha[d] been charged with Domestic Assault third degree, Burglary in the second degree and Kidnaping in the second degree."

Deputy Andreno indicated that respondent had been arraigned on those charges and released on bail. It is clear, therefore, that Deputy Andreno knew full well that respondent had already been arrested and arraigned, and that his right to counsel had already attached (see, e.g., *People v. Mitchell*, 61 NY2d 580 [1984].) Deputy Andreno's continued interaction with the respondent under these circumstances should therefore be deemed questionable, at best, under both state and Federal law.

Second, Deputy Andreno's supporting deposition conclusively refuted the Intermediate Appellate Court's finding that, ". . . since both [respondent] and his wife both independently and voluntarily advised the police of the handgun's existence and its location, the police would have inevitable discovered it anyway." (12a) Deputy Andreno's deposition proves that the police has no knowledge that the revolver even existed until the respondent was forced to tell them about it by the order of protection. Deputy Andreno's deposition also proves that he only contacted respondent's ex-wife because respondent had been forced to tell the police, after he had been arraigned and served with the order of protection, that he thought she had the revolver. The record suggests no other reason for Deputy Andreno to contact her at all.[8] It is illogical and contrary to the facts in the record to

8. Respondent's ex-wife was in no way involved in the alleged domestic violence incident referred to in Deputy Andreno's deposition.

speculate that the police would have inevitably discovered the pistol even without the respondent's uncounseled statements.[9]

JUDGE BARTLETT, of the Intermediate Appellate Court, reasoned that: ". . . to the extent, if any, that defendant was compelled to turn over his handgun, it is now well settled that 'a person can be forced to produce real or physical evidence' without violating his or her 5th amendment rights." (12a) He relied on *People v. Berg*, 92 NY2d 701, 704 (1999), which relied, in turn on *Schmerber v. California*, 384 U.S. 757, 764 (1966). He also relied upon *People v. Slavin*, 1 NY3d 392 (2004), cert. denied 543 US 818. He further reasoned, citing *Hubbell*, supra,, 530 U.S. 27, 34-35 (2000), that: ". . . there is a significant difference between the use of compulsion to extort communications from a defendant and compelling a person to engage in conduct that may be incriminating." (12a-13a)

All of those cases are simply inapposite as support for the points JUDGE BARTLETT decided. None deal with the present situation where the government orders a person to deliver something to the police, the possession of which will, in and of itself, subject him or her to arrest and prosecution. The New York Court of Appeals properly rejected JUDGE BARTLETT'S arguments. It held that the *delivery* of the revolver, compelled as it was by a court order, was testimonial, even if the revolver, itself, was not.

The order of protection made no exception or allowance for, and drew no distinction between, lawfully and unlawfully possessed weapons. As the New York Court of Appeals held, "Here, the element of state compulsion was unquestionably met. Defendant was ordered by a court to surrender his weapons.

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9. The people did not make this argument either to the Local Criminal Court or to the Intermediate Appellate Court. JUDGE BARTLETT, of the Intermediate Appellate Court, interjected it himself.

Had he failed to do so, he could have been prosecuted for criminal contempt." (4a) "The order compelling defendant to turn over his weapons was issued in the course of a felony prosecution without a grant of immunity or amnesty." (9a)

If the presence of firearms may escalate or complicate a domestic disturbance, so might the presence of recreational drugs. In another case one might then imagine that a Judge could order someone to turn all of his or her narcotic and hallucinogenic drugs over to the police, without limiting the scope of the order to those drugs for which he or she had a valid prescription. Under that scenario the possessor of the recreational drugs would face the same conundrum as did the respondent in this case. Obey the order and be prosecuted for criminal possession of narcotics, or disobey it and be prosecuted for criminal contempt of court. It is irrational to require a person to commit a crime to avoid prosecution for a crime. The law should discourage, not encourage, criminal behavior.[10]

Nevertheless, under circumstances such as these, the mere delivery of the thing which the order requires the delivery of is obviously testimonial. To paraphrase this court, "Compliance with the order tacitly concedes the existence of the thing demanded and its possession and control by the person to whom

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10. As observed by several members of the New York Court of Appeals during oral argument, although not mentioned in their opinion, public policy might be better served if the objects of protection orders knew that they would not be prosecuted if they obeyed those orders, rather than having guns hidden or secreted away in order to avoid such prosecution. The first alternative takes the guns out of circulation and neutralizes any threat which they might have posed to the person(s) in whose favor the order of protection was issued. The second alternative defeats the whole purpose for which the order of protection was issued in the first place. It leaves the guns in the possession of the persons whom the issuing court believed might utilize them harmfully.

the order is directed. The elements of compulsion are clearly present." (*United States v. Doe*, 465 U.S. 605, 613 [1984].)[11]

In one of the very cases cited by, the Intermediate Appellate Court, *Hubbell*, supra, 530 U.S. 27 (2000), MR. JUSTICE STEVENS echoed the Court's decision in *Doe*, supra, by pointing out that it was clear that the very act of producing the thing which a court order requires be produced may have a ". . . compelled testimonial aspect. . . . We have held that "the act of production' itself may implicitly communicate 'statement of fact.'" (*Hubbell*, supra, 530 U.S. 27, 36 [2000].)" The New York Court of Appeals adopted this rational. (6a-7a)

MR. JUSTICE STEVENS also wrote that, ". . . It as only through respondent's truthful reply to the subpoena that the Government received the incriminating documents of which it made 'substantial use' . . . in the investigation that led to the indictment." (*Hubbell*, supra, at 42-43.) Likewise, in this case, it was only by respondent's truthful and earnest effort to comply with the order of protection that the police received the incriminating information and evidence which they used to charge him. By producing a handgun in compliance with the order of protection, therefore, the respondent was compelled to admit that the handgun existed, was in his possession or control, and was authentic (i.e., not a toy or non-firing replica).

The New York court off Appeals specifically held that, "Before [respondent] revealed that he has possessed a revolver, neither the court nor the police were aware that defendant owned a handgun. Furthermore, [respondent's] statements about the

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11. This case, and many of the other cases cited below, are addressed to the validity of subpoenas. There is no demonstrable difference between a subpoena and a court order under these circumstances. Both are processes by which a court compels people to produce things.

gun were integral to compliance with the directive in the order of protection." (8a)

In *Baltimore City Department of Social Services v. Bouknight*, 493 U.S. 549 (1990), Ms. JUSTICE O'CONNOR also recognized the principle at play in this situation, to wit: ". . . The Fifth Amendment's protection may nonetheless be implicated because the act of complying with the government's demand testifies to the existence, possession, or authenticity of the things produced." (*Baltimore City Department of Social Services*, supra, at p. 555.)

Justice O'Connor did state that the Amendment would not shield against the incrimination that may result from the contents or nature of the thing demanded (*Baltimore City Department of Social Services*, supra), but that statement was not made in connection with, and would not apply under, these facts and circumstances.

In *Baltimore City Department of Social Services*, supra, a woman, Ms. Bouknight, who had been granted custody of her daughter under specific conditions designed to protect the child was charged with contempt of court for refusing to produce the child in court as ordered. She claimed that compelling her to do so would violate her rights under the Fifth Amendment. There is no parallel between that case and this one. Having one's own daughter in one's custody, pursuant to an order issued by a court of competent jurisdiction, is not, in and of itself, evidence of any criminality.

Note, however, that the Court in *Baltimore City Department of Social Service* did say that: ". . . Bouknight cannot invoke the [Fifth Amendment] privilege to resist the order to produce [her child]." But " . . . The same custodial role that limited the ability to resist the production order may give rise to

corresponding limitations upon the direct and indirect use of that testimony." Because, ". . . In a broad range of contexts, the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled." (*Baltimore City Department of Social Services*, supra, at p. 560.)

The issue in that case was, therefore, whether the mother could use the Fifth Amendment as a shield to block the court's power to compel her to produce her child, and this Court ruled that she could not. It did not reach the question of whether any information which the government might obtain as a result of her obedience to the court order could be used against her in a subsequent criminal prosecution, but it suggested the possibility that such use might be precluded by the Fifth Amendment.

The issue in this case in not whether the respondent could use the Fifth Amendment as a shield to block the court's power to compel him to surrender his revolver. He concedes that he could not. The issue in this case is the one which this court left unanswered in the *Bouknight* case. Once the respondent has surrendered his revolver to the police under compulsion of a court order, may the government use his production of that revolver as evidence against him in a prosecution for criminally possessing that same revolver?

The New York Court of Appeals noted that this Court had determined that the "act of production" doctrine did not apply to Ms. Bouknight's circumstances ". . . because it could not be used to resist compliance with a civil regulatory regime constructed to effectuate governmental purposes unrelated to law enforcement." (6a) The New York Court of Appeals held that "regulatory regime" exception to the act of production doctrine was unpreserved for its review in this case because petitioner had waived it. (7a)

Nevertheless, the accusation laid against respondent was founded under the New York State Penal Law, not part of any civil regulatory scheme. It was directly related to law enforcement purposes, and even so, the New York Court of Appeals noted that this Court had indicated, in *dicta* that the Fifth Amendment protections are not ". . . necessarily unavailable to a person who complies with the regularity requirements . . . ." (7a)

Possession of one's own blood is not, in and of itself, criminal, and the government may require a sample of one's blood under appropriate circumstances. (*Schmerber*, supra, 384 U.S. 757 [1966].) Displaying tattoos on one's body is not, in and of itself, criminal, and the government may require that one allow the tattoos to be photographed for display to a jury (*People v. Slavin*, supra.)

Possessing a distinctive voice, personal appearance, or style of handwriting is not criminal, and the government may require one to speak nonincriminatory words, to display one's physical appearance, or to provide a writing sample. (*United States v. Wade*, 388 U.S. 218 [1967]; *Holt v. United States*, 218 U.S. 245 [1910]; *Gilbert v. California*, 388 U.S. 266 [1967].)

Possessing a handgun is, in and of itself, criminal in the State of New York. New York State Penal Law § 265.01 provides that a person is guilty of criminal possession of a weapon in the fourth degree when he possesses any firearm (*i.e.*, any pistol or revolver). The statute defining the offense makes no distinction between licensed and unlicensed, or between registered and unregistered, firearms. Thus, simply by the act of obeying the order of protection and delivering the pistol to the police, the respondent was compelled to offer testimonial evidence incriminating himself.

As the New York Court of Appeals observed,

> "Indeed, by the time defendant produced the weapon, he had provided the police with proof of virtually every element of the offense of criminal possession of a weapon. Given that the act of production involved the commission of a crime in the presence of the police, it can hardly be argued that the conduct was unlikely to result in criminal prosecution."

(10a)

Clearly then, the mere act of producing the handgun pursuant to the order of protection had a communicative aspect of its own, completely separate from the nature of the thing produced. Respondent's compliance with the order tacitly conceded that the gun existed and that it was within his possession and control. (*Fisher v. United States*, 425 U.S. 391, 410 [1976]; *United States v. Fox*, 721 F.3d 32, 36 [Second Cir. 1983].)

In support of his motion to suppress, respondent alleged that his actions in disclosing the existence and location of the revolver of which he was accused of unlawfully possessing, and the statements he made to the police with respect to that revolver, were not voluntary, but were compelled, under penalty of punishment for criminal contempt of court, by the order of protection with which he had been served. (RA 1)

In his order suppressing the weapon and respondent's statements, JUDGE HAIT specifically found that,

> ". . . the manner in which the police obtained evidence of the defendant's guilt was in violation of his right to due process of law, and that the defendant was required to provide self-incriminating evidence against himself

> in violation of his rights under the Fifth Amendment to the United States Constitution and under Article I, section 6 of the Constitution of the State of New York, and that the evidence seized from the defendant, i.e. the weapon which he is accused of possessing, must be suppressed, along with the statements allegedly made to the police by the defendant in connection with that weapon"

and that the people had ". . . made no offer of proof with respect to any other evidence of the defendant's guilt not obtained in violation of his rights or tainted on account of such violation . . . ." (RA 5)

IV

It is unconstitutional for the government to place an individual in a position where he has no choice but to commit a criminal offense or to admit to a different criminal offense, and to then prosecute him for committing one or the other of such offenses. That is just what happened in this case. Respondent was offered a "Hobson's Choice" in which every option amounted to "go straight to jail, do not pass go."

This Court recognized the intolerable nature of such a situation long ago in the case of *Marchetti v. United States*, 390 U.S. 39 (1968).[12] Under the Federal Law, at that time, an excise tax was imposed on all persons engaged in the business of accepting wagers. Such persons were required pay an "occupational tax," and to register each year, and to obtain "revenue stamps" denoting his or her registration and the payment of his or her "occupational tax."

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12. See also, *United States v. Grosso*, 390 U.S. 62 (1968) which held, *inter alia*, that reversal of any conviction obtained in violation of the Fifth Amendment principles enunciated in *Marchetti* would be "inevitable." (*Id.* at 71.)

The taxing authority would not accept payment of either the "occupational tax" or the excise tax unless the gambler had submitted an Internal Revenue Service form disclosing his or her residence and business addresses, acknowledging that he or she was engaged in the business of accepting wagers, and listing the names and addresses of all of his or her employees. The law also included specific record keeping requirements and permitted inspection of those records.

Each Internal Revenue office was required to maintain a list of all persons who had paid the "occupational tax" for public inspection, and to provide certified copies of the list to any state or local prosecutor upon request. Registration or payment of the wagering taxes specifically did not exempt any person from prosecution under any Federal, State, or Local law regulating or prohibiting any taxable activity.

It became common for State and Local law enforcement and prosecutorial officials to use the Federal records compiled under the law to locate and identify persons engaged in gambling activities which were criminal under their laws, and even to use defendants' registration and tax payments as proof that they were engaged in the business of unlawful gambling.

Even though the petitioner in *Marchetti*, supra, was actually a criminal under the Laws of the State in which he conducted his business of accepting wagers, and even though he knew that his activities were criminal under those laws, the Supreme Court held that because he ". . . was required, on pain of criminal prosecution, to provide information which he might reasonably suppose would by available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" (*Marchetti v. United States*, supra, at p. 48), his assertion of his privilege against self-incrimination under the Fifth Amendment to the United States Constitution

was a proper defense which "... should have sufficed to prevent his conviction" (*Marchetti*, supra, at p.49).[13]

In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court ruled that:

> "The privilege [against compulsory self-incrimination] reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the [defendant] reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege."

(*Kastigar*, supra, at 445, 446; footnotes omitted.)

The *Kastigar* Court reaffirmed the constitutional principal that once a defendant has been compelled by the government to give testimony or to produce evidence which could either incriminate himself or herself, or lead to other evidence which might do so, the authorities must prove that their evidence is not tainted by establishing that they had a legitimate, independent source from which they obtained it. (*Kastigar*, supra, at 461.)

It would be impossible for the prosecution to have met this burden in this case. The only evidence they had came from statements made to law enforcement officers and evidence

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13. See *United States v. United States Coin and Currency*, 401 US 715 (1971) in which the Court held that the Fifth Amendment principles laid down in *Marchetti*, supra, were applicable to forfeiture proceedings commenced by the government as well as to actual criminal proceedings.

delivered to them under the compulsion of a criminal court order of protection. There can be no independent or legitimate source from which this evidence was obtained, and the New York Court of Appeals so held.

The people have cited *United States v. Kordel*, 397 U.S. 1 (1970) in the courts below, as a "similar case" to this one in which this Court had ruled that, ". . . without question [the defendant] could have invoked his Fifth Amendment privilege against self-incrimination" (*Kordel*, supra, at 9.), arguing that respondent had the same opportunity in this case, but failed to invoke it. Interestingly, the people did not then dispute the fact that Mr. Havrish did have a Fifth Amendment right. They would have it seem, apparently, that he waived his right by failing to assert it. JUDGE HAIT, of the Local Criminal Court, rejected this argument. JUDGE BARTLETT, of the Intermediate Appellate Court, did not address it, and the New York Court of Appeals held that the question had not been preserved for its review. (3a)

The defense argued then, and argues now, however, that *Kordel,* supra, simply does not apply in this case, either on the law or on its facts, because the respondent in that case was not actually required to respond to the government's interrogatories at all. They were addressed to a corporation with which the respondent was associated. As this Court said, the ". . . interrogatories obligated the corporation to 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.'" (*Kordel*, supra, at p. 8.)

In this case, the respondent had no such opportunity to avoid incriminating himself by appointing an agent to perform the task which he had been ordered to perform. He was the only person who had been ordered to turn over any and all firearms in his possession or under his control to the police. He was the only person who could comply with that order.

In *Kordel*, supra, the respondent had a fair opportunity to assert his privilege. If the government were dissatisfied with the answers the corporation provided, they could then have insisted on answers from the respondent, himself. That was the time for him to assert the privilege (the corporation, of course, had none). If the government still insisted on answers from the respondent, in person, they would have had to take him before a judge or magistrate, where he could continue to claim his privilege. If that judge or magistrate then ordered the respondent to respond to the government's questions, despite his Fifth Amendment right to be free from compulsory self-incrimination, the respondent would have, upon complying with the court's or magistrate's instructions, received immunity from prosecution as a matter of law.

Contrast and compare the respondent's position in *Kordel*, supra, with respondent's position in this case. Mr. Havrish would have been arrested for contempt of court had he been found to have violated the order of protection by withholding the unlicensed gun from the police. He would have been taken to a judge or magistrate all right, but not for an opportunity to assert his privilege. He would have been arraigned on the new charge. Whether or not he could have successfully raised his Fifth Amendment privilege as a defense to the charge of criminal contempt is problematic.

The rule that: ". . . unless some attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving [the accused's] consciousness of the facts and the operations of his mind in expressing it, the demand is not a testimonial one," clearly does apply to the communications which the respondent was compelled to make to the police in this case. The Fifth Amendment privilege extends to not only answers that would, in and of themselves, support a criminal conviction, but also

includes those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime, and "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." (*Hubbell*, supra, 530 U.S. 27, 38 [2000].) For this reason alone, the statements made by respondent to the police, after his arraignment on other charges, were properly suppressed.

This is not a case where the police observed the respondent's pistol from any place where they had a right to be, or where they saw it on his person, or on the seat of his car, or even where they discovered it during a lawful "stop and frisk." Even the respondent didn't know where the pistol was located. He thought his former wife had it. When she said she did not, he searched for and found it. But for his cooperation and the communication of the operation of his mind to the police, they would not have known about the pistol, they would not have found it, they would not have known that it was unlicenced or unregistered, and they could not have arrested him.

Respondent was conscious of the fact that there was a pistol which he had not given to the police. He was conscious that the order of protection required that he give it to them. The police had no reason to know that the pistol existed, much less where it was located, until the respondent told them about it. The operations of respondent's mind, clearly understanding and intending to comply with the terms of the order of protection, caused him to express the knowledge which he, and he alone, had at that moment, and required him to both inform the police as to the existence of the pistol, and, later, to deliver it to them. He was, in law and in fact, compelled to "speak his guilt" in the loudest and clearest way possible.

Furthermore, the idea that a person dealing with police officers in the context of a situation where a criminal prosecution is possible is expected to know his or her constitutional rights, and to be able to act in his or her best interest with respect to those rights, has long since been rejected. In 1966 this Court said, ". . . there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settlings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." (*Miranda*, supra, 384 U.S. 436, 467.)

Obviously, respondent's freedom of action was curtailed. He was ordered by a Court of competent jurisdiction to do something which he would not otherwise have had to do. He was compelled to allow police officers to come to his home and take away his personal property.

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut [sic] fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time. . . . . The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used

> against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege."

(*Miranda*, supra, at 468-469.)

The people do not even pretend that respondent was given any such warnings, at all, by anyone, ever, concerning any right he might have had (if, indeed, he ever did have one) to refuse to obey the order of protection by not turning over one of his guns to the police.

The people have relied heavily upon *Schmerber*, supra, 384 U.S. 757 (1966), which dealt with whether the seizure of a sample of an arrested person's blood, without his consent and over his clearly stated objections, in order to determine the alcohol level of that blood for use in a criminal prosecution for the equivalent of Driving While Intoxicated, was a violation of the person's rights under the Fourteenth Amendment (due process), the Fourth Amendment (searches and seizures), the Fifth Amendment (self-incrimination), or the Sixth Amendment (counsel). (*Schmerber*, supra, at 759.) The Supreme Court ruled that it was not.

The Court also noted, however, that while the Fifth Amendment privilege against compulsory self-incrimination was applicable to state law prosecutions against defendants in state courts by virtue of the Fourteenth Amendment (*Schmerber*, supra, at pp.760-761), ". . . the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and . . . the withdrawal of blood and

use of the analysis in question [did] not violate involve compulsion to these ends." (*Schmerber*, supra, at p. 761.)

In explaining this result, the Supreme Court drew an important distinction, stating that, "It is clear that the protection of the privilege reached an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. . . . On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture" (*Schmerber*, supra, at pp. 763-764).

This distinction is simple enough to understand. The accused's body need not be found. It is there for all to see. So too, the characteristics and physiological components of the accused's body involve no testimonial facet. It is not as though the police had to ask the accused, "Where are your fingers?" before they could take his fingerprints, or "Where is your face?" before they could take his photograph, or "Where is your blood" before they could take a sample of it.

Any rule which prevented the police from requiring an accused to assume a stance, to walk, or to make a particular gesture to aid in a witness's ability to identify him or her would logically require that the witness not be allowed to look at the accused at all. Requiring the accused to write or speak for purposes of identification, so long as the words written or spoken were not inculpatory in and of themselves, merely require him

or her to demonstrate additional physiological characteristics of his or her body.[14] These things do not involve communication.

No imparting of thoughts, ideas, or personal knowledge is involved. The same is true for requiring the defendant to stand in a lineup (*Wade*, supra, 388 U.S. 218 [1967].), to wear particular clothing (*Holt*, supra, 218 U.S. 245 [1910].), or to provide a handwriting exemplar (*Gilbert*, supra, 388 U.S. 266 [1951].).

This case is different. In this case the respondent was required to give testimonial evidence as to the existence and location of an unlawfully possessed handgun. This case is akin to compelling an accused to produce his or her personal papers, which the Schmerber court condemned (*Schmerber*, supra, at p. 763).

In this case the police would not have known that the respondent owned or possessed any firearms at all, unless he told them so. They would not have known where those firearms were located unless he told them so. Specifically, they would have known nothing at all about the particular pistol which

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14. See, *U.S. v. Wade, supra,* 388 U.S. 218 (1967), where the Supreme Court said, at pages 222-223, that

> ". . . compelling the accused merely to exhibit his person for observation by a prosecution witness . . . involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. . . . Similarly, compelling [the accused] to speak within hearing distance of the witnesses . . . was not compulsion to utter statements of a 'testimonial' nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt."

brought about respondent's arrest unless he told them about it.[15]

All of this involves testimonial communication which the respondent would not have made had he not been ordered, under pain of prosecution for contempt of court, to do so. In this case the police did have to ask the respondent, "Where are your guns?" before they could seize them or arrest him on this charge.

The Supreme Court also made it clear that, in *Schmerber*, supra, it was not dealing with Fourth Amendment issues such as government interference with property relationships or private papers, i.e., "houses, papers and effects" (*Schmerber*, supra, at 768-769),[16] and that authorities considering limitations on the kinds or property which might be seized under a warrant as distinct from procedures for searching and the permissible scope of searches did not apply (*Schmerber*, supra, at p. 769). They do apply here.

The people may argue that the order of protection was the equivalent of a warrant to search the respondent's home. Even if that argument were valid, which respondent disputes, there remains the issue of whether or not the court which issued the order of protection would have had sufficient probable cause to issue a search warrant for respondent's home. The most

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15. Examination of the Local Criminal Court Return will establish that the person who complained against the respondent in Delaware County, and in whose favor the order of protection was issued, did not know anything about that gun, and that the respondent, himself, had forgotten that he even had it or where it was. He had to search for it, find it, and then turn it over to the police after they had taken the rest of his guns.

16. It is ". . . a 'basic principal of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (*Payton v. New York*, 455 U.S. 573, 586 [1980].)

important aspect of this issue, however, is that the order was made in a different case by a different court, and respondent has been deprived of the ususal tools which the law affords him to test the validity of the "warrant" and the constitutionality of the search and seizure of his property.

CONCLUSION

This case is one in which this Court should deny certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS FROM AFFIDAVIT OF RESPONDENT WILLIAM P. HAVRISH DATED OCTOBER 6, 2005

* * *

SUPPRESSION OF SEIZED PROPERTY

20. I gave no consent to any search of my person or property, nor was there any contraband visible within my sight, reach or control prior to the time of my arrest. If the District Attorney intends to offer material evidence against me, it is respectfully submitted that such evidence was illegally seized, is inadmissible and must be suppressed or, in the alternative, a pre-trial hearing held to determine admissibility of same.

21. My actions in disclosing to law enforcement personnel the existence and location of the weapon which I am accused of unlawfully possessing, and the statements I made to said law enforcement personnel concerning that weapon were not voluntary within the meaning of the Constitutions of New York State and of the United States of America. I was compelled to disclose the existence and location of the weapon, and to deliver it to law enforcement by the clear and unambiguous language of an Order of Protection issued by another Court of competent jurisdiction.

22. Circumstances placed me in a "dammed if I do, dammed if I don't" position. If I refused to disclose the existence and location of the weapon I would have been guilty of criminal contempt of court. Because I obeyed the Court order, I was arrested for Criminal Possession of the very weapon which the Court ordered me to surrender to law enforcement.

* * *

Appendix A

3. That I offered evidence as to the existence of a weapon pursuant to a lawful order of another court to compelling me to disclose the existence and location of said weapon to law enforcement personnel, as I was ordered to do by the order of protection. That in turning over the weapon in question pursuant to the order of protection, I complied with a lawful order. Therefore, charging me with a crime for doing so violates my right to remain silent, to be free from violation my due process rights, violates my right to counsel and is generally repugnant with the purpose of the order of protection.

* * * *

APPENDIX B — ORDER OF THE STATE OF NEW YORK, COUNTY OF SCHOHARIE, LOCAL CRIMINAL COURT, TOWN OF JEFFERSON DATED AND ENTERED FEBRUARY 8, 2006

PRESENT: HON. LYNN H. HAIT,
Town Justice, Presiding.

STATE OF NEW YORK : COUNTY OF SCHOHARIE
LOCAL CRIMINAL COURT :
TOWN OF JEFFERSON

Case No. C06-0094

THE PEOPLE OF THE STATE OF NEW YORK

-against-

WILLIAM P. HAVRISH,

Defendant.

ORDER

The defendant, William P. Havrish, having been charged in this Court with the offense of Criminal Possession of a Weapon in the Fourth Degree, a class A misdemeanor in violation of New York State Penal Law § 265.01, subdivision 4, upon an accusatory instrument (information) duly affirmed under penalty of perjury by Sgt. Leonard Price, a police officer and a member of the Schoharie County Sheriff's Department, and the said defendant having duly appeared in this Court in person and by his attorney, and having entered a plea of "not guilty" to the charge specified in said accusatory instrument,

Appendix B

And, the defendant having served and filed an omnibus motion on or about October 7, 2005, consisting of a Notice of Motion dated October 6, 2005, the affidavit of the defendant, William P. Havrish, duly sworn to on the 6th day of October, 2005, the affirmation of Michael A. Jacobs, Esq., one of the defendant's attorneys, affirmed under penalty of perjury on October 7, 2005, and copies of various opinions and decisions of other Courts relied upon in support of the motion, and

The people, by Thomas F. Gardner, Esq., Assistant Schoharie County District Attorney, having served and filed an answer to the defendant's omnibus motion on or about January 11, 2006, and

The defendant having served and filed a reply to the people's answer to the omnibus motion in the form of a letter dated January 12, 2006 from Patrick J. Cannon, Esq., another of the defendant's attorneys, and

The matter come on before me at the above term of Court for oral argument on the motion, and having heard and considered the arguments presented on behalf of the defendant by his attorney, Patrick J. Cannon, Esq., and those presented on behalf of the people by Thomas F. Gardner, Esq., Assistant Schoharie County District Attorney, and

After, due deliberation, a decision having been rendered from the bench finding that, contrary to the assertions made in the defendant's motion, the accusatory instrument and supporting papers filed therewith were sufficient on their face to validly charge the defendant with the offense alleged, but

that the manner in which the police obtained evidence of the defendant's guilt was in violation of his right to due process of law, and that the defendant was required to provide self-incriminating evidence against himself in violation of his rights under the Fifth Amendment to the United States Constitution and under Article I, section 6, of the Constitution of the State of New York, and that the evidence seized from the defendant, i.e. the weapon which he is accused of possessing, must be suppressed, along with the statements allegedly made to the police by the defendant in connection with that weapon, and the people having made no offer of proof with respect to any other evidence of the defendant's guilt not obtained in violation of his rights or tainted on account of such violation, now, therefore,

Upon motion of Jacobs & Jacobs, Esqs., attorneys for the defendant, Patrick J. Cannon, Esq., of counsel, it is

ORDERED, that so much of defendant's motion as sought dismissal of the information filed against him on the basis that said information was defective within the meaning of section 100.40 of the New York State Criminal Procedure Law be, and it hereby is, DENIED, and it is further

ORDERED, that so much of the defendants motion as sought suppression of the evidence against him, to wit: the weapon which he was alleged to have possessed and the statements made to the police in connection with his possession of that weapon, pursuant to the Fourth Amendment to the United States Constitution and Article I, section 12, of the New York State Constitution (Freedom from Unreasonable Searches and Seizures), be and it hereby is, GRANTED, and it is further

Appendix B

ORDERED, that so much of the defendant's motion as sought dismissal of the information filed against him on the basis that the prosecution was barred under the Fifth Amendment to the United States Constitution and Article I, section 6, of the New York State Constitution (Freedom from Governmentally Compelled Self-Incrimination), be, and it hereby is GRANTED, and it is further

ORDERED, that the information duly affirmed under penalty of perjury on April 8, 2005 accusing the defendant of the offense of Criminal Possession of a Weapon in the Fourth Degree be, and it hereby is DISMISSED, and it is further

ORDERED, that the above dispositions having rendered the remaining relief sought by the defendant in his motion moot, all other parts of said motion by, and they hereby are DISMISSED without consideration.

Dated: February 08, 2006
at Jefferson, New York

ENTER

s/ Lynn H. Hait
Hon. Lynn H. Hait
Town Justice, Town of Jefferson

APPENDIX C — TRIAL COURT'S RETURN ON APPEAL DATED MARCH 24, 2006

COUNTY OF SCHOHARIE
TOWN OF JEFFERSON — TOWN COURT

PEOPLE OF THE STATE OF NEW YORK

VS

WILLIAM P. HAVRISH,

Defendant

TRIAL COURT'S
RETURN ON APPEAL
[CPL §460.10]

For the People: ADA Thomas F. Garner
For the Defense: Jacobs and Jacobs; Patrick J. Cannon, Esq.
The Court: Hon. Lynn H. Hait, Town Justice

The Appellant seeks relief from an Order issued by the Jefferson Town Court wherein evidence was ordered suppressed and inadmissible thereby necessitating the dismissal of a criminal charge.

Facts:

The defendant was arrested on April 9, 2005 at his residence in the Town of Jefferson upon a charge of Criminal Possession of a Weapon in the 4th Degree [§265.01 (4) NYS Penal Law].

Appendix C

Mr. Havrish was arraigned before the Jefferson Court on May 5, 2005 and through his attorney Michael B. Mendelson, Esq. entered a plea of not guilty. The matter was adjourned to accommodate a routine motion schedule.

The defendant, through newly retained counsel of Jacobs and Jacobs, Patrick J. Cannon, Esq. appearing, filed an Omnibus Motion with the court on October 7, 2005 seeking relief as to multiple matters of law.

The People's Answer, authored by Thomas F. Garner, Assistant District Attorney for Schoharie County, was received by the court on or about January 11, 2006.

The defendant served and filed a reply to the People's answer to the omnibus motion in the form of a letter dated January 12, 2006.

The court heard oral arguments on January 25, 2006 in open court where Mr. Garner and Mr. Cannon restated their position upon the multiple points of the motion. The defendant was present in court. The Court rendered its decision from the bench relative to the defendant's omnibus motion, favorably, in part, to the defendant, suppressing the evidence and dismissing the charge.

The Court executes and enteres the order on February 8, 2006 and forwards copies to the parties.

The Court receives for filing the People's Notice of Appeal on February 22, 2006.

Appendix C

The Court receives for filing the People's Affidavit of Errors on or about March 15, 2006.

Summary = [Ruling Judge's summary of adduced facts from the proceedings enumerated to correspond to appellant's Affidavit of Errors]

4.1) & 4.b)

At the time of his arrest on the instant charge, the defendant was additionally facing criminal charges in Delaware County and, pursuant to an Order of Protection, was ordered by the arraigning Court (Town of Delhi) to surrender any and all firearms.

The defendant, under court order, acknowledged the existence of weapons and surrendered same to Deputies of the Schoharie County Sheriff's Department. Among the weapons surrendered was an unlicensed handgun, the existence of which was the basis for the weapons charge levied against him by Deputy Sgt. Leonard Price. Had the defendant not been compelled to make self-incriminating statements, the existence of the unlicensed handgun may have remained unknown to the police. The defendant was told that the handgun must be given to the police and, pursuant to the court's directive, he, with his estranged wife's assistance, divulged its location.

It is the court's finding that the defendant was placed in a position where less than total compliance to the Delhi Town Court's order to surrender all firearms would be potentially prejudicial as a criminal contempt under the Penal Law and

quite possibly contemptuous under the Judiciary Law, while, as in the present circumstance, his total compliance to that same order would, and ultimately did, subject him to further prosecution on new criminal charges.

The defendant's admissions to the existence of the weapon were compulsory under mandate of a competent court's lawful order and therefore additional prosecutions on his actions is in violation of his right against self incrimination under both the United States and New York State Constitutions. The government cannot issue process mandates upon its citizenry only to prosecute them as they comply.

The evidence is suppressed (the weapon ruled inadmissible) necessitating, in the absence of any other evidence, the dismissal of the criminal charge.

Dated: this 24th day of March, 2006 in
The Town of Jefferson, New York

s/ Lynn H. Hait
Lynn H. Hait
Town Justice
Town of Jefferson

APPENDIX D — QUESTIONS PRESENTED TO THE NEW YORK COURT OF APPEALS IN RESPONDENT'S BRIEF TO THAT COURT

QUESTIONS PRESENTED TO THE NEW YORK COURT OF APPEALS IN RESPONDENT'S BRIEF TO THAT COURT

1. Was the appellant's right to due process under the Fourteenth Amendment to the United States Constitution violated when Judge Skovira ordered him to turn an unlicensed handgun over to the police? The Schoharie County Court answered this question in the negative.

2. Was the appellant's right to be free from compelled self-incrimination under the Fifth Amendment to the United States Constitution violate when Judge Skovira ordered him to divulge the existence and location of an unlicensed handgun to the police? The Schoharie County Court answered this question in the negative.

3. Was the appellant's right to be free from compelled self-incrimination under Article I, Section 6, of the New York State Constitution violated when Judge Skovira ordered him to divulge the existence and location of an unlicensed handgun to the police? The Schoharie County Court answered this question in the negative.

4. Was the appellant's right to be free from compelled self-incrimination under the Fifth Amendment to the United States Constitution violated when Judge Skovira ordered him to turn an unlicensed handgun over to the police?

5. Was the appellant's right to be free from compelled self-incrimination under Article I, Section 6, of the New York State Constitution violated when Judge Skovira ordered him to turn an unlicensed handgun over to the police? The Schoharie County Court answered this question in the negative.

6. Was the appellant's right to be free from unreasonable searches and seizures under the Fourth Amendment to the United States Constitution violated when Judge Skovira ordered him to turn an unlicensed handgun over to the police? The Schoharie County Court answered this question in the negative.

7. Was the appellant's right to be free from unreasonable searches and seizures under Article I, Section 12, of the New York State Constitution violated when Judge Skovira ordered him to turn an unlicensed handgun over to the police? The Schoharie County Court answered this question in the negative.

8. Was the Town Court of the Town of Jefferson (Judge Hait) correct when it suppressed the statements which the appellant made to the police relating to the unlicensed handgun? The Schoharie County Court answered this question in the negative.

9. Was the Town Court of the Town of Jefferson (Judge Hait) correct when it suppressed the unlicensed handgun which the police seized from the appellant? The Schoharie County Court answered this question in the negative.